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## EMPHASIZING SUBSTANCE: MAKING THE CASE FOR A SHIFT IN POLITICAL SPEECH JURISPRUDENCE

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Anastasia N. Niedrich\*

*Political speech is vital to a functioning democracy and is highly protected. That much is hardly disputed. What courts, legal scholars, and those seeking to convey a political message do dispute is how political speech should be identified and protected, and who should decide what constitutes political speech. This Note looks at the history of political speech doctrine and critiques two intent-based approaches that have been proposed by First Amendment scholars to define political speech. This Note proposes a solution to many problems inherent in defining, identifying, and protecting political speech within intent-based frameworks, arguing that focusing on intent creates a distinction without a difference and leads to uneven results in similar situations. The proposed solution, which I term the “Substance-based Political Contribution” Approach, focuses on the substance of the speech and the objective contribution it makes to political discourse, rather than focusing solely on the intent of the speaker or actor. This approach finds support in history and precedent, and is based on the Supreme Court’s recent decision in *FEC v. Wisconsin Right to Life*. An objective approach emphasizing substance rather than intent, such as the Substance-based Political Contribution Approach, will more effectively consider and evaluate free speech rights and First Amendment concerns, providing greater determinacy, preventing unequal results in similar instances of speech or action, and protecting a greater proportion of expressive conduct, to the benefit of all.*

### INTRODUCTION

One evening in the spring of 2003 in Provo, Utah, a lesbian couple sought to attend the Provo High School prom. The pair of public school students entered the venue, took pictures, and nervously began to dance. Shortly after they started, Provo High School faculty member Todd Smith told the couple that, solely because of their same-sex sexual orientation, they could not participate and Mr. Smith and Provo High School administrators harassed the couple until they left the premises. The night began with a simple wish to attend a high school prom. By night’s end, the couple’s

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ejection from their prom had become a political statement about the rights (or the lack thereof) of members of the gay<sup>1</sup> community.<sup>2</sup>

After being denied entrance to their prom, one member of the couple worked with the American Civil Liberties Union of Utah to defend the couple's rights and to ensure that other gay couples would be able to attend prom without incident in the future. The event received media attention, sparked political dialogue,<sup>3</sup> and eventually led to greater tolerance and acceptance for gay persons, demonstrated by several gay couples' successful attendance at the school's prom events in the following years.<sup>4</sup> However, legal action did not proceed because the couple's counsel advised them that Utah courts would not likely find their actions to be protected under the First Amendment.

Twenty-three years earlier in Rhode Island, in the case of *Fricke v. Lynch*, a federal district court protected a gay male couple's actions when they sought to attend their public high school prom. The couple sued for the right to attend.<sup>5</sup> During the course of legal proceedings, one member of the couple stated that simply to enjoy the dance was one of his motivations, but communicating a political message<sup>6</sup> about homosexuals' desire to live openly and be accepted was his primary intent.<sup>7</sup> The court found the act of attending prom as a same-sex couple constitutionally significant, meriting First Amendment protection both as speech and an act of association.<sup>8</sup>

These contrasting legal outcomes are due to a single factual difference: the Rhode Island couple acted with the intent to send a

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1. The spectrum of sexuality, including sexual orientation and gender identity, is wide-ranging, including lesbian women, gay men, bisexual, transgender, and queer persons. For the sake of brevity only, the term "gay" will be used to refer to any member of the LGBTQIA (lesbian, gay, bisexual, transgender, queer or questioning, intersex, and asexual) community unless otherwise specified.

2. Readers should note that this author was one member of the couple.

3. See, e.g., Julie Scelfo, *Out at the Prom*, Newsweek.com, June 9, 2002, <http://www.newsweek.com/2003/06/08/out-at-the-prom.html>.

4. See Press Release, ACLU, *Provo High School Sees First Same-Sex Couple Promenade at Prom* (Apr. 29, 2005), available at <http://www.acluutah.org/pr042905.htm>.

5. 491 F. Supp. 381 (D.R.I. 1980).

6. See Aaron Fricke, *One Life, One Prom*, in THE CHRISTOPHER STREET READER 21, 24-25 (Michael Denny et al. eds., 1983), reprinted in LESBIANS, GAY MEN, AND THE LAW 175 (William B. Rubenstein ed., 1993) ("For a moment I thought of all the people who would have enjoyed going to their proms with the date of their choice, but were denied that right; of all the people in the past who wanted to live respectably with the person they loved but could not; of all the men and women who had been hurt or killed because they were gay; and of the rich history of lesbians and homosexual men that had so long been ignored. Gradually we were triumphing over ignorance. One day we would be free.").

7. See *Fricke*, 491 F. Supp. at 383-85.

8. *Id.* at 386-87.

political message while the Provo couple only wanted to attend their high school prom. The Provo couple's political statement was made unintentionally.

But why should only actions intended to communicate a message garner First Amendment protection, while the exact same actions without that intent go unprotected, if the end result and the contribution to political discourse are the same? Should not both couples' actions be constitutionally protected under the First Amendment regardless of their intents? If so, how should those actions and their unintended consequences be protected? Recent Supreme Court decisions suggest one way to respond: focus future decisions on the objective contribution instead of the subjective intent behind the statement.

This Note argues that speaker intent is irrelevant if the substance of the communication is political and the speech contributes to political discourse—if speech contributes to the political discourse it should be protected, subject to familiar limits when speech causes physical harm or has other criminal effects. As the American tradition and First Amendment jurisprudence have long recognized, the greater the number of viewpoints and broader the political discourse, the better for democracy.<sup>9</sup>

Defining political speech by its actual contribution to political discourse and not just by its intent to be political would yield numerous social benefits. One positive ramification would be the elimination of the difficult and often indeterminate folk psychology required to assign speech value according to the subjective intent of the speaker. Another would be to better safeguard the speech society likely wants to protect<sup>10</sup> by ensuring that no single individual or entity would have license to determine what is political speech and when and whether it should be protected, leaving First Amendment rights subject to potential abuse.<sup>11</sup>

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9. See, e.g., *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) (discussing the history of American speech, including the Founding Fathers' goals).

10. Consistent with the aforementioned purpose and motivation behind the First Amendment, the speech that the Framers, and society, likely want to protect is most likely anti-majoritarian speech. See *id.*

11. Justice Stevens voiced this concern in his dissent in *Boy Scouts of America v. Dale*:

[T]he majority insists that we must "give deference to an association's assertions regarding the nature of its expression" and "we must also give deference to an association's view of what would impair its expression." So long as the record "contains written evidence" to support a group's bare assertion, "[w]e need not inquire further." Once the organization "asserts" that it engages in particular expression, "[w]e cannot doubt" the truth of that assertion.

530 U.S. 640, 685–86 (2000) (Stevens, J., dissenting) (internal citations omitted).

Additionally, an objective approach would avoid the inconsistent results that occur under the prevailing intent-based frameworks<sup>12</sup>—for example, the protection of the actions of one same-sex couple attending prom but not another’s. Certainly, an objective approach has its own drawbacks, but also great potential for rewards, including a greater amount and higher quality of political discourse.

Part I provides the history of the Supreme Court’s intent-based analysis of political speech and discusses the shift in the Supreme Court’s jurisprudence over time. This historical review finds analytical foundations of the “Substance-based Political Contribution” Approach in existing jurisprudence, reflected in the Court’s growing discomfort with intent-based approaches. Part II discusses the shortcomings of prevailing academic explanations of political speech in First Amendment jurisprudence. Part III proposes the Substance-based Political Contribution Approach as a solution to the inherent weaknesses of intent-based approaches, addressing its potential flaws and considering its limitations.

## I. SUPREME COURT HISTORY AND PRECEDENT

### *A. Past Political Speech Precedent—Reflecting Dissatisfaction With Intent-Based Approaches*

The Supreme Court’s political speech doctrine has developed relatively recently in American history. For many years during the early period of political speech jurisprudence, before and during World War I, the Supreme Court’s decisions swung mostly one way, deferring to the government and toward greater regulation and limitation of political speech. In this period, the Court limited speech for a number of reasons, including wartime state power, potential harm (physical or otherwise) to citizens, and the offensive nature of the speech itself, regardless of its contribution to public or political discourse.

In times of war, the Court usually found in favor of the government and upheld free speech restrictions for the sake of national, citizen, or troop security.<sup>13</sup> In *Schenck v. United States*, the Court denied a citizen and prominent Socialist Party member the right to speak out against the military draft.<sup>14</sup> The Court justified this based

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12. “Intent-based” frameworks or approaches include approaches identifying, defining, and protecting speech based on the intent of some speaker or actor, whether the individual or the government.

13. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

14. *Id.*

on the Nation's wartime footing, concluding that "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."<sup>15</sup>

In *Abrams v. United States*, the Court upheld the constitutionality of the Sedition Act of 1918, which criminalized aiding enemies of the United States and interfering with the war effort or military recruitment.<sup>16</sup> *Abrams* found leaflets calling for war resistance and revolution not to be protected speech.<sup>17</sup> The Court dismissed the idea that the substance of the speech might not reflect the speaker or actor's apparent intent, or the effect that the speech actually had on those subjected to it:

It will not do to say, as is now argued, that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States, for [that was] the obvious effect of [the communications].<sup>18</sup>

In *Debs v. United States*, the Court focused on the intent of political speech rather than the substance.<sup>19</sup> In *Debs*, the Court found Socialist anti-war speech that obstructed recruiting not to be protected by the First Amendment.<sup>20</sup> Even though the defendant tried to pose his words in such a way as to fit within the boundaries of permissible anti-government speech under the Espionage Act,<sup>21</sup> the Court found his speech to violate the law by virtue of its intent and upheld the defendant's conviction.<sup>22</sup> The Court said that the mere making of the communication evinced intent to violate the law:

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15. *Id.*

16. 250 U.S. 616 (1919) (upholding 40 Stat. 553 (1918) (amending The Espionage Act of 1917, 40 Stat. 217 (1917))).

17. *Id.* at 619–24.

18. *Id.* at 621.

19. 249 U.S. 211 (1919).

20. *See id.* at 217.

21. The *Debs* opinion reflects numerous instances of the defendant making general statements and statements that are not directly anti-U.S. military, including "if" statements such as "I would oppose the war if I stood alone." *See, e.g., id.* at 214.

22. *See id.* at 216. The *Debs* Court reached its conclusion quickly and easily. The *Debs* opinion is exceptionally brief, consisting of only about six pages.

"[e]vidence that the defendant accepted [the view that The United States' involvement in World War I was unjustifiable] . . . at the time that he made his speech is evidence that if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect."

During the period after World War I through the end of World War II, the pendulum started to swing back toward the middle, balancing free speech protections with concerns about specific harms to citizens rather than citing generalized harm to the nation or the military as it had before. In this period, there are two prominent political speech precedents: *Chaplinsky v. New Hampshire*<sup>23</sup> and *Board of Education v. Barnette*.<sup>24</sup> In a unanimous opinion, the *Chaplinsky*<sup>25</sup> Court divided speech into two tiers, placing Chaplinsky's speech into the unprotected category:

[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.<sup>26</sup>

In *Chaplinsky*, the Court set the limit of free speech protections at the point of inciting or causing physical harm, finding Chaplinsky's verbal assault on a law enforcement officer not to be covered under the First Amendment's free speech protections.<sup>27</sup>

In *Barnette*, the Court overruled another decision on the same issue of just three years earlier, holding that the Free Speech Clause protected students from being forced to say the Pledge of Alle-

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23. 315 U.S. 568 (1942).

24. 319 U.S. 625 (1943).

25. 315 U.S. 568 (1942).

26. *Id.* at 571–72 (citations omitted).

27. See *id.* at 569 (defendant called the marshal a "damned Fascist," among other things).

giance and salute the American flag in school.<sup>28</sup> *Barnette* was novel in at least two ways: the Supreme Court recognized that an act—or the substance of an act—can communicate a political message whether intended or not and it recognized that the Free Speech Clause protected individuals from compulsion to act when the act would compel the individual to convey a certain message.

The *Chaplinsky* and *Barnette* Courts topically shifted focus from government to individual political speech protections, and focused on individual freedoms to exercise control over a political message. However, during this period, unlike in cases of the previous era, the Court did these things with almost no discussion of intent or effect.

From the end of World War II—but mostly since the 1960's—until about the year 2010, the pendulum continued to swing toward allowing and protecting more individual speech of all kinds while deferring to the needs of the government less frequently. As representative of this time, in several cases since *Chaplinsky*, the Supreme Court has pared down the grounds on which the *Chaplinsky* fighting-words doctrine is held to apply, gradually allowing more individual political speech.<sup>29</sup>

*Cohen v. California* is one clear example of this shift. In *Cohen*, the Court upheld free-speech protections for an individual communicating a direct, profane, anti-military statement,<sup>30</sup> the likes of which would have certainly landed the defendant in jail during the *Abrams* and *Debs* era.<sup>31</sup> The Court found that the words did not qualify as “fighting words” because the defendant did not communicate any “personally abusive epithets,” but merely a general anti-war sentiment.<sup>32</sup> Instead of focusing on the intent of the speaker or on the government’s authority to regulate speech, the Court focused on the individual’s rights and looked at the substance of the communication. Even though the message in *Cohen* was unpopular and anti-government, the Court found the speech covered by the First Amendment.<sup>33</sup>

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28. 319 U.S. at 625. Compare *Barnette*, with *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 587 (1940) (holding that public schools could compel students religiously opposed to doing so to salute American flag and recite the Pledge of Allegiance).

29. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971) (holding a profane anti-military statement to be protected free speech); *Street v. New York*, 394 U.S. 576 (1969) (holding that offensive treatment of American flag insufficient to justify limits on free speech).

30. *Cohen*, 403 U.S. at 16 (defendant walked through a courthouse wearing a jacket in court bearing the words “Fuck the Draft”).

31. See *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

32. *Cohen*, 403 U.S. at 20.

33. *Id.* at 16.



During this period the Court further expanded individual rights and the diversity of speech by striking down provisions expected to have a chilling effect on political communication.<sup>34</sup> For example, in *Talley v. California* and *McIntyre v. Ohio Elections Commission*, the Court repudiated attempts to criminalize the distribution of anonymous pamphlets and campaign literature, respectively.<sup>35</sup> In *New York Times v. Sullivan*, the Court expressed its interest in keeping public discourse “wide open” by carving space out of defamation law for the free discussion of the conduct of public officials.<sup>36</sup> And in cases in other contexts including education,<sup>37</sup> flag burning,<sup>38</sup> and race,<sup>39</sup> the Supreme Court continued to focus on the substance of communications, gradually finding intent or effect less relevant in determining whether such communications deserve First Amendment free-speech protections. The *FEC v. Wisconsin Right to Life* decision, discussed in greater detail in Part I.B, *infra*, is the culmination of the swing in jurisprudence toward protecting individual free-speech rights and emphasizing the substance of a communication.<sup>40</sup>

Although cases of this latest era were decided on a variety of grounds, the changing tide of political speech protections is a common thread among them. The shift in the Supreme Court’s political speech jurisprudence remained mostly consistent during this period, toward more protection for individuals and political speech, with greater emphasis on substance rather than intent or effect.

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34. See, e.g., *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168–69 (2002) (requiring permits for political advocates ruled an unconstitutional restriction on First Amendment speech rights because of chilling effect on political communication).

35. *Talley v. California*, 514 U.S. 334 (1995); *McIntyre v. Ohio Elections Comm’n*, 362 U.S. 60 (1960).

36. 376 U.S. 254 (1964).

37. See, e.g., *Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853 (1982) (barring school officials from removing library books because they disagreed with the content of the books’ messages).

38. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that flag burning as a protest is symbolic political speech protected by First Amendment).

39. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down an ordinance because of its overbreadth and content-based proscription of only some speech activities which conveyed messages concerning particular topics).

40. See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

*B. The Future of Political Speech Jurisprudence—FEC v. Wisconsin Right to Life and Beyond*

Recent First Amendment jurisprudence reflects the Supreme Court's increasing dissatisfaction with primarily intent-based approaches in identifying and protecting political speech. The Court's focus on speech's effects and the intent behind it has increasingly been replaced with emphasis on the substance of the speech. This trend has culminated in the *Wisconsin Right to Life*<sup>41</sup> decision that, while limited to a specific regulatory context, highlights and signals the Court's awareness of a fatal defect in any intent-based approach to the delineation of political speech.

In *Wisconsin Right to Life*, the Supreme Court wrestled with an as-applied challenge to the Bipartisan Campaign Reform Act ("BCRA"). The BCRA prohibited organizations such as Wisconsin Right to Life from using corporate money to run issue advertisements close to an election, primarily in an effort to weaken the power of political action committees.<sup>42</sup> In contention was the application of the BCRA to the funding of Wisconsin Right to Life's advertisements urging voters to contact senators and influence judicial nomination proceedings.<sup>43</sup>

Emphasizing the substance of the issue-advertisements and analyzing their nature objectively, rather than focusing on the intent behind or effect of the ads, the Supreme Court held the BCRA's limitations unconstitutional as applied to issue advertisements like Wisconsin Right to Life's because the substance of the organization's ads were not candidate-specific in violation of the BCRA.<sup>44</sup>

The *Wisconsin Right to Life* opinion discussed past political speech precedents,<sup>45</sup> drawing attention to the Supreme Court's more than sixty-year history of analyzing political speech in a manner evincing a gradual move away from intent-based approaches to identifying and protecting political speech. Faced with the challenge of determining whether Wisconsin Right to Life's advertisements were candidate-specific "campaign ads," "speech expressly advocating the election or defeat of a candidate for federal office,"<sup>46</sup> the Court refused to consider the "intent and effect" of the advertisements. Any test, the Court insisted, "should . . .

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41. *Id.*

42. *Id.* at 503.

43. *Id.* at 459.

44. *Id.* at 469–70.

45. *See, e.g., id.* at 456 (discussing *McConnell v. FEC*, 540 U.S. 93 (2003)); *id.* at 451 (discussing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

46. *Wisc. Right to Life*, 551 U.S. at 456.

reflec[t] our profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open . . . .<sup>47</sup>

An intent-based test could not meet this standard because it “‘blankets with uncertainty whatever may be said,’ and ‘offers no security for free discussion’”<sup>48</sup> thus chilling political speech.<sup>49</sup> Therefore, the Court concluded, “The proper standard must be objective, focusing on the substance of the communication . . . .”<sup>50</sup>

While *Wisconsin Right to Life* evaluated the appropriateness of an intent-based test in the regulation of political speech, the Court’s concerns apply with equal force to the problem of defining it. Whether the move is framed as a regulation of political speech through the use of intent-based categories or as definition of the category itself in terms of speaker intent, the same problem results: it becomes difficult for a would-be speaker to know ahead of time whether his speech will be protected and, thus, “[i]t compels the speaker to hedge and trim.”<sup>51</sup> Thus, if “First Amendment freedoms need breathing space to survive”<sup>52</sup> there can be no more place for an intent-based test in the definition of political speech than in the categories by which it is regulated. Indeed, the Court seemed to recognize this broader point in their endorsement of Martin Redish’s claim that “[u]nder well-accepted First Amendment doctrine, a speaker’s motivation is entirely irrelevant to the question of constitutional protection.”<sup>53</sup>

Despite the articulation of a new standard, political speech is still difficult to identify. There has been little discussion of the impact or practical operation of the standard since *Wisconsin Right to Life*. This may be because the Supreme Court’s decisions have espoused different standards for political speech over time, and scholars had for some time, before *Wisconsin Right to Life*, held the view that intent is the right benchmark for such speech.<sup>54</sup> Yet, much can be learned and gained from analyzing previously-advocated intent-based approaches to political speech when fashioning a new and

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47. *Id.* at 467 (quoting *Buckley*, 424 U.S. at 14).

48. *Id.* at 468 (quoting *Buckley*, 424 U.S. at 43).

49. *Id.*

50. *Id.* at 469.

51. *Thomas v. Collins*, 323 U.S. 516, 535 (1945).

52. *Wisc. Right to Life*, 551 U.S. at 468–69 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

53. *Id.* at 468 (quoting MARTIN REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* 91 (2001)).

54. See, e.g., Larry A. Alexander, *Free Speech and Speaker’s Intent*, 12 CONST. COMMENT. 21, 26 (1995); Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992).

better standard for dealing with political speech in the decision's wake.

## II. ACADEMIC APPROACHES TO POLITICAL SPEECH AS INSUFFICIENT

### A. Current Political Speech Theories

For many years, legal scholars have focused on intent when analyzing the Court's approaches to political speech. Two academic theories are prominent. Cass Sunstein advocates an approach that focuses on the speaker's intent.<sup>55</sup> First Amendment scholar Larry Alexander advocates an approach that centers on the government's intent and interests in regulating.<sup>56</sup> After discussing why the two current theories are insufficient to explain the Court's current standard, this Note attempts to build on the logic of *Wisconsin Right to Life* and fill the void.

Cass Sunstein has defined "political speech" as speech that "is both intended and received as a contribution to public deliberation about some issue."<sup>57</sup> Sunstein asserts that in order for speech to be political and deserving full First Amendment protection, two requirements must be met: political speech must be not only intended by the speaker, but also received as a political message by the listener.<sup>58</sup> Sunstein's test appears to be a modification of a standard articulated by the Supreme Court in *Texas v. Johnson*.<sup>59</sup>

Sunstein considers it "implausible to think that words warrant the highest form of protection if the speaker does not even intend to communicate a message . . . ."<sup>60</sup> As to listeners receiving the political message, Sunstein claims that not all listeners need to "see the substantive content . . . . But if no one sees the political content, it is hard to understand why the speech should so qualify."<sup>61</sup> Sunstein argues that although some listeners or readers might not recognize the substantive content of speech, so long as some do

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55. See Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992).

56. See Larry A. Alexander, *Free Speech and Speaker's Intent*, 12 CONST. COMMENT. 21, 26 (1995).

57. Sunstein, *supra* note 55, at 304.

58. *Id.*

59. See *Texas v. Johnson*, 491 U.S. 397, 404 (1989) ("In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974))).

60. Sunstein, *supra* note 55, at 304.

61. *Id.*

and the content they recognize is intended, the speech should be protected.<sup>62</sup> Sunstein distinguishes between “low-value and high-value speech;”<sup>63</sup> high-value speech is intended and low-value speech is not.<sup>64</sup> Thus, for Sunstein, the intention of the speaker is the crucial difference between speech worthy of protection and speech unworthy of protection.<sup>65</sup>

In a response to Sunstein’s article, another legal scholar, Larry Alexander, has asserted that “free speech is about limitations on the government’s authority . . . to control what facts we know and what arguments and ideas we consider.”<sup>66</sup> Alexander argues that “the principal focus should not be on the value inhering in . . . speech or the communicative intentions of authors.”<sup>67</sup> Instead, Alexander contends that “the focus should be on the government’s reasons for regulating.”<sup>68</sup> Thus, Alexander’s approach is another subjective approach, but focusing on the intent of the government rather than the speaker’s.

### *B. Shortcomings of Intent-Based Political Speech Approaches*

Intent-based approaches to political speech have significant shortcomings and offer “no security for free discussion.”<sup>69</sup> For various reasons, both of the main academic approaches to political speech fail to protect the ideals of the First Amendment. Both theories succumb to some or all of the following weaknesses: indeterminacy and resulting failure to correctly assign value to speech due to an improper focus on intent (whether the speaker’s in speaking, or the government’s in regulating); chilling core political speech through reliance on vague doctrinal categories;<sup>70</sup> failure to consistently handle and safeguard the speech society likely wants to protect;<sup>71</sup> and giving individuals or entities license to determine

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62. See *id.*

63. *Id.*

64. See *id.*

65. Larry A. Alexander, *Free Speech and Speaker’s Intent*, 12 CONST. COMMENT. 21, 26 (1995).

66. *Id.* at 27.

67. *Id.* at 22.

68. *Id.* (citing Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547, 553 (1989)).

69. *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 467 (2007) (quoting *Buckley v. Valeo*, 424 U.S. 1, 43 (1976)).

70. See the discussion of *FEC v. Wisc. Right to Life* *supra* Part I.B.

71. Consistent with the aforementioned purpose and motivation behind the First Amendment, the speech the Framers and society likely want to protect is anti-majoritarian speech. See *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) (discussing the history of American speech including the Founding Fathers’ goals).

what is political speech and when and whether it should be protected, leaving First Amendment rights vulnerable to abuse.<sup>72</sup>

Sunstein's approach is insufficient for three reasons: the approach's intent requirement leads to indeterminacy and inconsistent results; the approach would chill speech by its dependence on vague and shifting categories; and the approach fails to provide guidelines to determine when the second prong (i.e. listeners' receiving the message as a political one) has been satisfied.

The first prong of Sunstein's approach focuses on the intent of the speaker, requiring that a communication be intended as a contribution to public deliberation about some issue before the communication will be treated as political speech.<sup>73</sup> But in only protecting intentionally political speech, Sunstein's approach is insufficient because it fails to provide any guidelines to determine the existence or scope of an actor's intent.

Though Sunstein offers a preemptive response to this concern, it relies on a dubious assumption. Sunstein offers that "[g]enerally this issue [of intent] can be resolved simply on the basis of the nature of the speech at issue."<sup>74</sup> Sunstein makes it seem easy to discern the intent of the speaker, but as everyday human interactions prove, discerning another's intentions is often not an easy task. Thus, Sunstein's approach seems to require a clairvoyant judiciary in order to be properly applied.<sup>75</sup>

Not only is it inherently problematic that Sunstein's approach requires courts to do the impossible, but the courts' inevitable failure to read minds also leaves would-be speakers, particularly those at the margins, with little certainty that their speech will or will not be protected. Thus Sunstein's approach would chill precisely the political speech richest in new ideas.

Sunstein's approach to political speech is also problematic in that seemingly identical instances of expressive conduct are treated differently solely because of the actor's difficult-to-discern intentions, leading to inconsistent results.<sup>76</sup>

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72. This is the concern Justice Stevens voiced in his *Dale* dissent. See *Boy Scouts of America v. Dale*, 530 U.S. 640, 685–86 (2000) (Stevens, J., dissenting).

73. See Sunstein, *supra* note 55, at 304 ("I will treat speech as political when it is . . . intended . . . as a contribution to public deliberation about some issue.").

74. *Id.*

75. Part of Justice Stevens' disagreement with the majority in *Dale* has to do with the proper solution to just this problem. See *Dale*, 530 U.S. at 685–86 (Stevens, J., dissenting).

76. The Supreme Court voiced this objection in *Wisc. Right to Life*, 551 U.S. 449, 468 (2007) ("A test focused on the speaker's intent could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another [under the BCRA].").

For example, burning the American flag,<sup>77</sup> burning a cross,<sup>78</sup> or wearing a jacket with a profane statement on it<sup>79</sup> all constitute instances where the Supreme Court recognized conduct as speech. Under Sunstein's approach, if an individual set fire to an American flag or cross intending that the audience understand that action as a political statement, the action would be protected under the First Amendment.<sup>80</sup> Similarly, the First Amendment would protect an individual wearing a jacket with a profane statement intending to make a political statement. However, if a homeless individual did any of these things for warmth—burn a flag, burn a cross, or wear a jacket bearing a profanely worded political message—the statement would not be protected.<sup>81</sup> In any of these acts, however, some might hear a political message, whether intended by the speaker or not.<sup>82</sup>

The second prong of Sunstein's approach requires that the audience receive the message as political.<sup>83</sup> This prong is problematic because it is too subjective, in that it requires that listeners receive a communication as a political message before the communication garners First Amendment protection, without establishing any guidelines for determining how or when a message was successfully received. As Larry Alexander explained the issue:

[S]peech . . . may convey an indefinite number of ideas to its audience. The ideas conveyed vary depending upon what the unit of speech is taken to be, the context into which it is placed, and the audience to which it is presented. Some ideas may seem more valuable than others—because we think some are true and important, while others are either false or banal—but we cannot locate the ideas that audiences derive from speech *in* the speech itself.<sup>84</sup>

Stated another way, “[w]hatever the author intends to communicate by her speech, it is always possible and indeed likely that the ideas the audience receives will be different.”<sup>85</sup> This can produce absurd and undesirable results.

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77. See *Texas v. Johnson*, 491 U.S. 397 (1989).

78. See *Virginia v. Black*, 538 U.S. 343 (2003).

79. See *Cohen v. California*, 403 U.S. 15 (1971).

80. See Sunstein, *supra* note 55, at 303–05.

81. See *id.*

82. See *id.*

83. See Sunstein, *supra* note 55, at 304.

84. Alexander, *supra* note 65, at 21.

85. *Id.* at 22.

This also gives rise to even greater concerns that marginal speech may be chilled. It is worrying enough that a speaker might have to rely on a court's interpretation of its own intent. But a speaker left to rely on her audience's proper understanding of her speech is left in a precarious position indeed.

Alexander's test, which revolves around the intention of the government, succumbs to many of the same pitfalls as Sunstein's, but to a more troublesome degree. Alexander's approach is insufficient because: it does not provide guidelines to determine the government's true regulatory intent; it leaves free speech rights in the hands of the government, which historically has done great violence to First Amendment freedoms;<sup>86</sup> and it ignores some of the affirmative goals of the First Amendment.

First, Alexander's approach is unsatisfactory because it grounds First Amendment protections in a system dependent on the government's regulatory intent, yet fails to provide any way by which to discern the government's regulatory intent. As Alexander explained by way of example, the government can regulate expression for a variety of reasons:

If government forbids destruction of draft cards because of the costs of reissuing them, that should not be a [F]irst [A]mendment case, even if some who destroy draft cards do so to express political ideas. If government forbids destruction of draft cards to prevent those political ideas from being communicated, that *should* be a [F]irst [A]mendment case, even if no one intends a political message in destroying a draft card.<sup>87</sup>

Still, Alexander's approach fails to explain how to determine the true intent behind the government's regulatory actions. If an individual burns a draft card and the government prosecutes that individual because burning draft cards is forbidden allegedly for "cost reasons," how is a court supposed to determine the government's true regulatory intent? The Supreme Court has acknowledged the difficulty in ascertaining government intent in a

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86. See *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (discussing the history of political speech protections and the way in which they are "[p]remised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.").

87. Alexander, *supra* note 65, at 25. At the same time as Alexander uses this example to attempt to support his own approach, he implicitly supports this Note's thesis: that political speech can be unintentional, and still contribute to political discourse, implicating the First Amendment and justifying free speech protection.



variety of circumstances. *Keyes v. School District Number One* is illustrative of the problem with attempting to discern the government's regulatory intent. In *Keyes*, a local government school authority undertook identical action with several schools, but obtained different results (some segregated and some non-segregated schools).<sup>88</sup> The Court held that a school district that "racially or ethnically" segregated one part of a large urban district created an arguably rebuttable presumption that similar segregation throughout the district was not "adventitious."<sup>89</sup> Concurring in part and dissenting in part, Justice Powell noted that ascertaining intent is difficult and "[t]he results of litigation—often arrived at subjectively by a court endeavoring to ascertain the subjective intent of school authorities with respect to action taken or not taken over many years—will be fortuitous, unpredictable and even capricious."<sup>90</sup> Such cases provide examples of political branches furnishing one stated reason for speech limitations, with those rationales actually serving as a pretext to subvert unpopular or susceptible minority interests.

Thus, Alexander's approach is insufficient because it fails to account for a key component of his theory (i.e., how to determine the government's true regulatory intent), leading in application to uncertain and inconsistent results.

Alexander's view is also conspicuously unconcerned with the value of the speech itself that is restricted. So long as the government is able to state a permissible purpose in regulating (whether genuine or pretextual) its restrictions on speech will be upheld. Thus Alexander's approach fails to achieve one of the Free Speech Clause's major goals: the First Amendment exists not only to prevent government from stifling criticism and shaping public debate to its advantage but to fulfill the affirmative goal of "making men free to develop their faculties."<sup>91</sup> Thus it is not adequate only to look to the government's intent; the objective value of the speech must also be taken into account, not only in the speaker's personal journey of self-development, but in the speech's value to others in their personal and political capacities.

Since Sunstein's and Alexander's intent and effects-based approaches fail to protect properly the speech our society would like to protect, and succumb to various unacceptable shortcomings,

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88. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973).

89. *Id.* at 191.

90. *Id.* at 233 (Powell, J., concurring in part and dissenting in part).

91. *Whitney v. California*, 274 U.S. 357, 375 (1927).

and the Supreme Court has found such tests insufficient,<sup>92</sup> a shift in focus is necessary.

In their place, this Note proposes the “Substance-based Political Contribution” Approach as a new, alternative test and a means of animating the Court’s suggestions in *Wisconsin Right to Life*. The Substance-based Political Contribution Approach seeks to avoid the pitfalls of primarily intent and effects-based approaches by defining and protecting political speech in a manner that focuses not on what speech is to the speaker, but what speech is to, and does for, the community.<sup>93</sup>

### III. A NEW FOCUS AND ANOTHER OPTION

#### A. The “Substance-based Political Contribution” Approach

Piecing together a more inclusive approach from historical pre-scripts, guiding words of wisdom from Supreme Court opinions, and avenues in precedent, the Substance-based Political Contribution Approach is formulated thus: speech, whether in words, symbols, or actions, that conveys a political message and substantially contributes to a more open political discourse, should be viewed as political speech and maximally protected under the First Amendment.

Therefore, the Substance-based Political Contribution Approach should be applied by focusing on the substance of the communication rather than on its intent or effect, based on a reasonable person’s interpretation of the contribution.

The approach is comprised of two prongs: (1) speech (whether as words or expressive conduct) has to convey a political message; and (2) the speech must contribute to a more open political discourse.

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92. See *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 468–69 (2007).

93. See JOHN STUART MILL, *ON LIBERTY* 87 (David Bromwich & George Kateb eds., Yale University Press 2003) (1859) (“[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”).

### 1. Would a Reasonable Person Understand the Speech to Convey a Political Message?

First, in order to judge whether speech conveys a political message, courts should look to the substance of the communication, rather than its intent or effect. This is a fact-based inquiry depending on the circumstances of the case, the social context, and the speech itself. Herein, "political speech" would be defined in the spirit of Justice Oliver Wendell Holmes's dissenting opinion in *Abrams v. United States*, in which Justice Holmes discussed the extreme importance of the "free trade in ideas" to democracy.<sup>94</sup> As Holmes spoke about it, the exposition of political speech or ideas enlightens, educates, and furthers democratic self-awareness.<sup>95</sup> The Substance-based Political Contribution Approach defines speech "that conveys a political message contributing to more open political discourse" as: words, symbols, or actions, whether intended or not, that express an idea or are understood as expressing an idea related to the public discussion of issues of societal importance<sup>96</sup> on a local or larger scale.

In determining whether speech conveys a political message, courts should use a "reasonable person" standard, asking whether a reasonable person would understand the speech as a political message. The reasonable person's understanding of the speech as a political message would not require that the person understood the message as intended, nor require that the speech resulted in any desired effect. The "reasonable person" employed in this prong would not be limited to any particular small geographic area (i.e., not the "reasonable person" from the city of Ann Arbor, Michigan), but would instead be a "reasonable person" taking into account a national perspective, in an attempt to balance often extreme opinions among differing geographies, and allow the broadest possible range of political speech.<sup>97</sup> Because speech is protected or not based upon the reasonable person's judgments about the meaning of the speech and not his liking of it, there is no need to worry that this invocation of the reasonable person would result in a "heckler's veto" of unpopular speech. Using these guidelines,

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94. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

95. *Id.*

96. For example, issues that might be the subject of candidates' political debate, or a political measure, or a law, or a vote, would be considered of societal importance.

97. For this purpose, the trier of fact might consider whether the speech in question would be understood as a political message in either of two divergent, extreme political climates. If a reasonable person located in either of two opposing political climates would understand the speech as conveying a political message, the speech would qualify for First Amendment protection.

if a court determines that the substance of the communication, regardless of intent or effect, conveyed a political message to a reasonable person, the speech has passed the first prong of the test for classification as political speech.

Within this standard, a reasonable person would evaluate the political contributions of not just pure speech, but also conduct. Political speech contributing to a better quality public discourse does not only derive from intentional acts or statements. Youth in particular do not always intend the consequences of their actions.<sup>98</sup> For example, in *Morse v. Frederick*, a high school student (Joseph Frederick) made a banner reading “Bong Hits 4 Jesus” and displayed the banner in view of television cameras during an Olympic torch relay as it passed through his town.<sup>99</sup> As one commentator described Frederick’s aim with the banner, “[h]is goal was partly to get on TV as the Olympic torch passed through his town of Juneau, Alaska, and mostly to get under the skin of his disciplinarian principal, Deborah Morse, with whom he had a running feud.”<sup>100</sup> The slogan, which Frederick said he saw on a snowboard sticker, was deemed an “absurd, vaguely offensive, mostly nonsensical message of protest” by one commentator.<sup>101</sup> The Supreme Court discussed the “Bong Hits 4 Jesus” message thusly: “The message on Frederick’s banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all . . . . But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use.”<sup>102</sup>

The Supreme Court found that Frederick’s banner promoted illegal drug use, and “consistent with the First Amendment, [a school principal may] restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.”<sup>103</sup> Although the dissenting opinion “emphasize[d] the importance of political speech and the need to foster national debate about a serious issue [(drugs)],” the majority opinion dismissed the possibility that the banner contributed to, or warranted protection as political speech because neither of the parties asserted so.<sup>104</sup>

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98. See, e.g., *Morse v. Frederick*, 551 U.S. 393 (2007) (asserting that such speech should be afforded First Amendment free speech protections under certain conditions).

99. See *id.*

100. Robert Barnes, *Justices to Hear Landmark Free-Speech Case: Defiant Message Spurs Most Significant Student 1st Amendment Test in Decades*, WASH. POST, Mar. 13, 2007, at A3.

101. *Id.*

102. *Morse*, 551 U.S. at 401.

103. *Id.* at 403; *id.* at 441 (Stevens, Souter, and Ginsburg, JJ., dissenting).

104. See *id.* at 402–03 (internal quotations and citations omitted).

The “Bong Hits 4 Jesus” incident resulted in hundreds if not thousands of media publications and several court cases,<sup>105</sup> eventually culminating in a U.S. Supreme Court battle.<sup>106</sup> The case has been called “[t]he most important student free-speech conflict to reach the Supreme Court since the height of the Vietnam War.”<sup>107</sup> The incident evidences the way in which unintended conduct can have an impact on political discourse, in this case the proper scope of free speech in public schools. Thus, this sort of expressive conduct can contribute to public discourse and should be protected as political speech.<sup>108</sup>

The Supreme Court has also recognized the obvious fact that actions or speech can convey unintended messages in *Boy Scouts of America v. Dale*.<sup>109</sup> As Justice Stevens pointed out in his dissenting opinion, the majority’s holding in *Dale* is effectively that “Dale’s mere presence among the Boy Scouts will itself force the group to convey a message about homosexuality—even if Dale has no intention of doing so.”<sup>110</sup> In *Dale*, the Boy Scouts’ First Amendment “right to choose to send one message but not the other” silenced the constitutional concerns of excluding an individual because of the unintended message that individual’s mere presence would allegedly send to others.<sup>111</sup> One important principle underlying the *Dale* decision was that speech or actions, whether actual speech or an association, can have unintended consequences: “[t]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster’s uniform sends a distinctly different message from the presence of a heterosexual . . . .”<sup>112</sup> The *Dale* majority held that association is capable of conveying, and sometimes does convey, an unintentional political message that is constitutionally significant and worthy of First Amendment protection, and that a

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105. See, e.g., NYRA Freedom: NYRA Participates in Free Speech Rally, NAT’L YOUTH RIGHTS ASS’N, Apr. 12, 2007, available at <http://www.youthrights.org/nyrafreedom/volume7/issue4.php> (“A few years ago, a high school student named Joseph Frederick was punished for unfurling a banner that read ‘bong hits 4 Jesus’ and subsequently quoting Thomas Jefferson to his principal. He sued, and won, but the principal brought the case to the Supreme Court . . . . Protesters held signs that read ‘free speech 4 students’ as well as a large ‘free speech 4 students’ banner designed to look like the ‘bong hits 4 Jesus’ banner that caused all the controversy. There was a lot of media coverage of this event.”).

106. *Id.*

107. Barnes, *supra* note 100.

108. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 446 (2007) (Stevens, J., dissenting).

109. 530 U.S. 640, 648 (2000) (holding that the Freedom of Association allows a private organization to exclude a person from membership when “the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints”).

110. *Id.* at 692 (Stevens, J., dissenting).

111. *Id.* at 656.

112. *Id.* at 655–56.

speaker's intent or motivation "is entirely irrelevant to the question of constitutional protection."<sup>113</sup> Thus, the Court held that the Boy Scouts had a right not to send an unintended message by not associating with Dale.

To see the Substance-based Political Contribution Approach in action, it is helpful to return to the earlier prom examples. Both Aaron Fricke and the Provo High School couple sought to attend their high school proms because of a desire to participate and enjoy one another's company. Yet, because one couple also intended to communicate a political message, these otherwise identical situations were treated differently. As some scholars have argued, the mere act of "coming out" and identifying oneself as a gay person can communicate an unintended message.<sup>114</sup> An approach focusing on the objective contribution to discourse, rather than solely on the intention of the parties speaking or acting, such as the Substance-based Political Contribution Approach, avoids this sort of inconsistent outcome and, thus, is better suited to achieving equitable ends.

Thus the two prom cases probably would have come out differently under the Substance-based Political Contribution Approach. The first prong of the Substance-based Political Contribution Approach focuses the inquiry on whether a reasonable person would find that the speech conveyed a political message. In both the Provo High School case and *Fricke*, by their attendance at their respective proms, both couples made statements on the status of gay rights, a significant social issue of political importance on various levels in localities nationwide.<sup>115</sup> Thus, so long as a reasonable person would view an act, such as attending prom as a gay couple in a hostile locality, as a statement on the political issue of gay rights, both couples' speech acts (attending prom) would garner First Amendment protection under the Substance-based Political Contribution Approach.

*Dale* may also have been decided differently if courts had followed the Substance-based Political Contribution Approach. Dale's decision to join the Boy Scouts would have been regarded

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113. MARTIN REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 91 (2001); see also *Dale*, 530 U.S. at 656.

114. See Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159, 163 (2003) (arguing that when lesbians and gay men speak as open lesbians and gay men, their speech is political and thus deserving of protection under the First Amendment, and that the mere act of "coming out" and identifying oneself as a lesbian or gay man can unintentionally convey numerous political messages).

115. See, e.g., Brad Knickerbocker, *Political Battles Over Gay Marriage Still Spreading*, CHRISTIAN SCI. MONITOR, Nov. 29, 2004, at 1.

as conduct conveying a political message. Thus, he would have been afforded First Amendment protections. Applying the Substance-based Political Contribution analysis, as to the first prong, the Supreme Court opinion recognized that a reasonable person could certainly understand the mere act of being the sole openly homosexual Boy Scout leader to convey a political message.<sup>116</sup> Moreover, if Dale's mere act of being an openly gay member of the organization could achieve this result, then Dale's actions in that role could also lead a reasonable person to understand Dale's presence or actions to convey a political message, and they would garner the heightened First Amendment protections afforded political speech. Therefore, Dale would have been able to articulate his own First Amendment interest against which the Boy Scout's interest in expressive association would have to have been weighed.

Thus, the results of the *Dale* decision and the Provo High School situation, where competing factors prevented recognition of Dale's and the Provo High School prom couple's acts as Free Speech, might not be so under the Substance-based Political Contribution Approach. The Substance-based Political Contribution Approach is preferable to current intent-focused approaches because it recognizes and protects a greater quantity and quality of speech, while chilling less speech at the margins, the substance of which contributes to political discourse on important social and political issues.

## 2. Does the Speech Contribute to a More Open Political Discourse?

Second, in order to judge whether speech contributes to more open political discourse, courts should look to the effect that the speech has on the public's discussion of the issue(s) raised by the speech. First, courts must ask objectively, on a national level, whether the message has the effect of conveying a political message anywhere in the nation as it would be understood by a reasonable person. The weak national standard is used here to ensure counter-majoritarian viewpoints are heard. Next, in assessing whether a political message contributes to a more open political discourse, courts should analyze the impact the speech has on political discourse on a local scale, looking at the smallest relevant locality in a given situation. The local standard is used here because a message's contribution to political discourse will vary by location.

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116. See *Boy Scouts of America v. Dale*, 530 U.S. 640, 656 (2000) ("[T]he forced inclusion of Dale would significantly affect [the Boy Scouts's] expression.").

For example, a gay couple's attending prom in San Francisco, California will probably not contribute as much to political discourse as a gay couple's attending prom in Provo, Utah.

This inquiry proceeds in line with an ideal long-supported by First Amendment jurisprudence: a discussion involving a greater number of diverse views is better for society, so courts should err on the side of allowing speech if there is a question about whether the speech is protected by the First Amendment.<sup>117</sup> Speech that advances a cause or aids in the progression of society would "contribute" to more open political discourse. Further, "open" as used here would be defined as enabling access for diverse viewpoints in political discussions, including minority viewpoints, whatever that minority may be in a given locality. Under these guidelines, if a court determines that speech adds to political discourse, and enables a broader discussion by involving more diverse or minority viewpoints in the political debate of issues, the speech has passed the second prong of the test to attain First Amendment protection as political speech.

*B. Supreme Court Precedent and Historical Experience Support the Substance-based Political Contribution Approach*

The Substance-based Political Contribution Approach would not revise all of First Amendment jurisprudence. The approach is merely an attempt to redefine core political speech, adapted from statements of the Supreme Court in *FEC v. Wisconsin Right to Life*.

The freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment . . . . To safeguard this liberty, the proper standard . . . must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect.<sup>118</sup>

Although the Court was urging an objective standard in the context of the regulation of political speech, the concerns the Court voiced are general and apply to any intent-based approach

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117. See *Whitney v. California*, 274 U.S. 357, 375–76 (1926) (Brandeis, J., concurring) (discussing the history of American speech including the Founding Fathers' goals).

118. *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (citing *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 447 U.S. 530, 534 (1980)); *Buckley v. Valeo*, 424 U.S. 1, 43–44 (1976)).



to circumscribing political speech.<sup>119</sup> Therefore, in *Wisconsin Right to Life* there is explicit support, if not an outright push, from the Supreme Court for a substance-focused approach to identifying and protecting political speech.<sup>120</sup>

The Substance-based Political Contribution Approach also finds much support in history and experience. The Framers of the Constitution considered free expression key to a representative democracy, truth,<sup>121</sup> personal identity, and self-enlightenment, and as such, sought to protect speech supporting or contributing to the furtherance of democracy and other worthwhile goals.<sup>122</sup> Recognizing that the vitality of our democratic system depends on the free exchange of ideas between citizens, and recalling recent free speech troubles, “[t]here can be little doubt that suppression by the government of political ideas that it disapproved, or found threatening, was the central motivation for the [Framers to draft the First Amendment] clause.”<sup>123</sup> Although the fledgling American republic initially struggled with the boundaries and import of political speech protections and freedom of speech enforcement,<sup>124</sup> subsequently the United States Supreme Court has increasingly broadened the scope of political speech and other First Amendment freedoms (although this has not been without limit and, in some cases, retraction).<sup>125</sup> As the Supreme Court put it in *New York Times v. Sullivan*:

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, “was fashioned to assure unfettered interchange

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119. See *supra* Part I.B.

120. See *Wisc. Right to Life*, 551 U.S. at 469.

121. As Justice Brandeis commented, the Founders “believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.” *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

122. See Sunstein, *supra* note 55, at 305; see also *Whitney*, 274 U.S. at 375–76 (discussing the Framers’ goals).

123. Sunstein, *supra* note 55, at 305; see also *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (“Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.”) (citing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000)).

124. This is perhaps best evidenced by the Sedition Act of 1798, which made it criminal to make certain kinds of critical statements against the government. Sedition Act of 1798, 1 Stat. 596 (1798).

125. See, e.g., *Morse v. Frederick*, 551 U.S. 393 (2007) (affirming the constitutional rights of students to free speech but limiting student speech at the point where it advocates illegal activities).

of ideas for the bringing about of political and social changes desired by the people."<sup>126</sup>

The Supreme Court explained in *Stromberg v. California* that the "opportunity [for free political discussion is] essential to the security of the Republic, . . . a fundamental principle of our constitutional system" that has been a focus of American government since its founding.<sup>127</sup> An objective approach to identifying, defining, and protecting political speech is the best manner of ensuring the realization of these all-important ideals. Therefore, it is appropriate to refocus on the substance of the communication and the objective contribution that speech makes, via the Substance-based Political Contribution Approach.<sup>128</sup>

### CONCLUSION

Subjective and objective approaches may both be criticized, but it is important to remember the vital end sought: to correctly, equitably and consistently define, identify, and protect political speech to enable diverse political discourse for the benefit of the larger community and country.<sup>129</sup> Our nation was founded on certain ideals, including the principle that free speech is essential to an

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126. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

127. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

128. See, e.g., *Bonner v. Gay Students Org. of the Univ. of N.H.*, 509 F.2d 652, 660–61 (1st Cir. 1974); see also Bobbi Bernstein, *Power, Prejudice, and the Right to Speak: Litigating "Outness" Under the Equal Protection Clause*, 47 STAN. L. REV. 269, 270–71 (1995) ("Because personal and political declarations of nonheterosexual identity are often necessary for self expression and advocacy, legal and social prohibitions on outness silence sexual minorities and remove their perspectives from public debate . . . . [T]he public disclosure of sexual identity plays a critical role in the political struggle for equality."). "Altering social perceptions is one of the most powerful forms of political activism," *id.* at 275, and political speech must be protected in order to for that to take place. *Id.* at 275–76. As Bernstein points out, the Supreme Court "has only once addressed the First Amendment implications of coming out, in Justice Brennan's dissent from the denial of certiorari in *Rowland*," *id.* at 279, and in that opinion supported that a statement of bisexuality involved its speaker in the debate "[that] is currently ongoing regarding the rights of homosexuals." *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1012 (1985) (Brennan, J., dissenting), *cert. denied*, 730 F.2d 444 (6th Cir. 1984).

129. See *Stromberg v. California*, 283 U.S. 359, 369 (1931) (The "opportunity [for free political discussion is] essential to the security of the Republic, . . . a fundamental principle of our constitutional system."); *Whitney v. California*, 247 U.S. 357, 395 (1927) (Brandeis, J., concurring) ("[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.").

honest, open, free, and functional democracy.<sup>130</sup> Although several approaches have been proposed, the Supreme Court has all but explicitly rejected intent and effects-based approaches to determining, identifying, and protecting political speech. This Note suggests merely one alternative objective approach, the Substance-based Political Contribution Approach, which follows the Supreme Court's trajectory and attempts to predict how political speech jurisprudence has evolved and will continue to evolve in the future. Adapting political speech jurisprudence to this new Substance-based Political Contribution Approach will best maximize the amount and contributions of speech to political discourse, and hopefully, achieve the end the Founding Fathers sought when they drafted the First Amendment, "to make [all citizens] free to develop their faculties . . . [and] discover[] . . . political truth."<sup>131</sup>

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130. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Brandeis, J., concurring) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

131. *Whitney*, 274 U.S. at 375–76 (Brandeis, J., concurring) (discussing the history of American speech including the Founding Fathers' goals).